United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-5023

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

W. T. GRANT COMPANY,

Debtor.

ZARTLEG DEVELOPMENT CORP. ("ZARTLEG"),

Appellant,

v.

W. T. GRANT COMPANY, THE CREDITORS COMMITTEE, CINNAMINSON SHOPPING CENTER, INC., CHANNEL COMPANIES, INC.,

Appellees.

ON APPEAL FROM A MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT ZARTLEG

JACK DASHOSH
Attorney for Appellant Zartleg
450 Park Avenue
New York, N. Y. 10022
(212) 371-3900

COWAN, LIEBOWITZ & LATMAN, P.C.
Of Counsel
200 East 42nd Street
New York, N. Y. 10017
(212) 986-6272

(5628B)

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Appellees.	:	

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BRIEF OF APPELLANT ZARTLEG

STATEMENT OF ISSUES

1. Where there has been an openly and fairly conducted judicial sale of a debtor's real property and there has been no appraisal, does the sole fact that a subsequent, belated bid is substantially higher than the first successful bid permit the Bankruptcy Judge to reopen the bidding?

2. In the same circumstances, where the belated bidder has, also, itself engaged in questionable conduct with respect to the bidding and the Court, was the District Court correct in holding that the Bankruptcy Judge had discretion to reopen the bidding?

3. Under the circumstances here, was the District Court correct in holding that there was no procedure by which the Bankruptcy Court could have made provision in its orders for the reimbursement to appellant Zartleg of the amounts expended by it with respect to the properties in reasonable reliance upon the results of the December 11, 1975 bidding, at least until it learned that Channel would move to reopen the bidding?

4. Does appellant Zartleg as the high bidder at the

December 11, 1975 bidding have standing to object and appeal with respect to the reopening of bidding and eventual sales to appellee Channel?

5. Does the fact that appellant Zartleg did not obtain a stay of the sales to appellee Channel render the appeals moot where appellee Channel is still subject to the jurisdiction of the Court, has been made party to the appeals and can be ordered to furnish complete relief to appellant Zartleg?

6. Should the Bankruptcy Court, as one of equity, have permitted Channel to engage in its admitted conduct below?

STATEMENT OF THE CASE

Introduction

This brief is respectfully submitted in support of an appeal from a memorandum and order of Judge Wyatt dated May 17, 1976 affirming three orders of Bankruptcy Judge Galgay, two entered on December 31, 1975 and a third dated March 1, 1976 and entered March 2, 1976.

All three orders appealed from involve the same facts and issues. The two orders entered on December 31, 1975, in effect, denied confirmation of the assignment to appellant Zartleg Development Corp. (hereinafter "appellant Zartleg" or "Zartleg") of two leases of the debtor W. T. Grant Company (hereinafter "debtor Grant" or "Grant") of closed stores, one located in Cinnaminson and the other in Cherry Hill, New Jersey and confirmed the assignment of such leases to the Channel

Companies, Inc. (hereinafter "appellee Channel" or "Channel"). At a judicial sale conducted before Judge Galgay on December 11, 1975 the two leases had been knocked down at the auction to appellant Zartleg for $26,500 each. Thereafter, upon a motion by appellee Channel alleging that the two leases had been sold for a grossly inadequate consideration, the Bankruptcy Court declined to sign the orders proposed by appellant Zartleg confirming the assignments to it and reopened the bidding for these leases on December 30 and 31, 1975.

At the reopened bidding appellee Channel was the high bidder for both leases, and orders confirming the assignments to Channel were then entered.

The third order appealed from, entered on March 2, 1976, denied appellant Zartleg's timely motion for a reargument of the court's two prior orders of December 31, 1975, confirming the sales to appellee Channel.

Accordingly, the records for the two appeals from the December 31, 1975 orders were identical and the record for the appeal from the March 2, 1976 order consists of the same documents involved in the prior two appeals plus those involved in the motion to reargue denied below. For the sake of simplicity, therefore, references herein to the record will be to that designated for the first two appeals except where the third appeal (hereinafter

the "March 2, 1976" appeal) is noted.

Statement of Facts

There is virtually no dispute between the parties about the facts. The tale is a somewhat bizarre one.

Debtor Grant filed a petition for relief under Chapter XI of the Bankruptcy Act on October 2, 1975 and was authorized on the same day to continue to operate its business and manage its properties as a debtor-in-possession. As part of its program for rehabilitation, Grant sought to close some 579 of its 1070 stores. This involved, along with liquidation of inventory, the assignment of the leases of the closed stores to those willing to pay for them in cash and assume Grant's obligations under the leases. As part of its program to assign the leases Grant communicated with over 200 potential purchasers, receiving numerous written offers from them. Eventually, Grant concluded that it was willing to accept offers for these store leases and decided to seek authorization from the Court to consummate the assignments.

Upon Grant's application, the Bankruptcy Court by Order to Show Cause dated December 2, 1975 ordered that the various "Interested Persons", including appellee Channel, show cause on December 11, 1975 why an order should not be entered authorizing the debtor to assign the leases to the various high bidders for them, including appellee Channel. Appellee Channel had specifically made written offers for the leases of store number

193 in Cinnaminson, New Jersey and store number 331 in Cherry Hill, New Jersey in the amount of $20,000 for each location.

The December 2, 1975 Order to Show Cause specifically requested autority for the debtor to assign the leases to the specified high bidders, such as appellee Channel, "or to any other person making a higher and better offer therefor..." on the return date. [emphasis added] (Order to Show Cause dated December 2, 1975, pp. 1 & 2 and Exhibit A thereto) (A-8,9).*

The Court ordered that service be made of such Order to Show Cause and Application of the debtor to all of the "Interested Persons," including the landlords and mortgagees and the high and other bidders as well as the Creditors' Committee.

The Application of Grant stressed that each of the high bidders was willing to pay "a substantial sum for the assignment of the lease for which it has submitted a bid," that the premises were vacant and of no value to Grant apart from the ability to assign, that Grant was "willing to accept the offer of each [such] person" and that the debtor was proceeding by Order to Show Cause to obtain a "hearing at the earliest possible time in order to facilitate the prompt consummation" of the assignments. (Application of debtor Grant dated December 2, 1975, pars. 6, 7, 4 and 8.) (A-13,15)

No appraisal of the leases was made or communicated to the Court in connection with this application.

*A shall be used herein to refer to the Appendix.

On December 11, 1975, in addition to Channel as the "High Bidder" offering $20,000 for each of the two leases, appellant Zartleg appeared to enter the bidding and offered $21,000 for store No. 193 in Cinnaminson (December 11, 1975 TR 25-27) (A-66,68).

Appellant Zartleg is a wholly owned subsidiary of Vornado, Inc., owner of various retail store claims, including Two Guys Discount Department Stores and the Builders Emporium do-it-yourself, leisure-time home centers. The Builders Emporium chain has very recently been brought to the East Coast and is a new entrant in the New Jersey market and a direct competitor of Channel there (Rogoff Aff't sworn to January 7, 1976, par. 3, Rec. March 2, 1976 App.; Grant Aff't in opposition to Channel motion sworn to December , 1975*, par. 11; December 31, 1975 TR 16) (A-131).

After granting Channel a ten minute recess in which to obtain authority to bid competitively beyond its prior formal bid of $20,000 (December 11, 1975 TR 27)(A-68), the Court continued the bidding for the Cinnaminson store, and it was knocked down to appellant Zartleg for $26,500. Appellant Zartleg next successfully outbid Channel for the lease of the second store (No. 331 Cherry Hill), again with a final bid of $26,500 (December 11, 1975 TR 31-32) (A-72, 73).

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*Due to the fact that the original of this affidavit could not be found in the Court's file, with the agreement of all concerned, a copy not bearing the precise date of execution had been furnished by us to the Court for the purpose of being part of the record on appeal.

Channel was given a full opportunity to authorize its representatives to bid against Zartleg ("a previously unknown bidder") on December 11, 1975, and its representative actually conferred by telephone with its Chairman of the Board from the Court (Slater Aff't sworn to January 16, 1976, par. 3 and Abramovitz Aff't sworn to January 22, 1976, pars. 5 and 6, Rec. March 2, 1976 App.; December 11, 1975 TR 27; Tudor testimony December 30, 1975 TR 13) (A-68,86).

Thereafter, on December 12, 1976, outside of the Court, Mr. Slater, Channel's Board Chairman telephoned Zartleg's President Mr. Rogoff to propose that Zartleg split the two leases in question (Slater Aff't sworn to January 16, 1976, par. 5; Rogoff Aff't sworn to January 7, 1976, pars. 6-10, Rec. March 2, 1976 App.)(A-181, 164). Mr. Slater's and Mr. Rogoff's characterizations of that conversation differ, however: Mr. Slater claims that he only asked whether Mr. Rogoff "would be interested in selling Channel" (par. 5) one of the leases whereas Mr. Rogoff states that Mr. Slater, after saying that "we could have gotten together about purchasing the two leases" (par. 7), proposed that they split the leases (par. 8).

But Mr. Slater does not deny that when he telephoned on December 12 he first stated that he had not known that Vornado (Zartleg's parent) was interested in acquiring 25,000 square foot stores of this kind for its Builders Emporium chain (compare Rogoff Aff't, par. 7 with Slater Aff't, par. 4) (A-165,181).

Both Mr. Slater and his attorneys also now claim that on the very day, December 11, 1975, when Channel had hoped

to obtain the leases, without other bidding, for its $20,000 written offers and when it declined to bid over $25,000 at the public, judicial sale, it fully realized that each of the leases was "worth substantially in excess of $26,500." (Slater Aff't, par. 5; Abramovitz Aff't, par. 7).(A-181,174).

On December 24, 1975, both Channel and Zartleg appeared at the Court by their attorneys. (Abramovitz Aff't, par. 8, sworn to January 22, 1976, Rec. March 2, 1976 App.)/ (A-175) Zartleg was apparently present to urge that the Court sign the proposed order confirming the sale of the leases to it, and Channel was there to submit an Order to Show Cause setting down for December 30, 1975 its motion for the denial of such confirmation and for reopening of competitive bidding for the two leases. (Id). Zartleg's attorney argued that the Slater telephone call was improper. (Id). Judge Galgay then declined to sign the proposed order of confirmation but signed the December 24, 1975 Order to Show Cause making Channel's motion returnable on December 30, 1975. (December 30, 1975 TR 33)/ (A- 106) But there is no record of the December 24, 1975 proceedings.

In support of its motion, Channel offered only the December 23, 1975 affidavit of Mr. Levin, one of its attorneys, setting forth, remarkably, these grounds for the relief sought: that the December 2, 1975 Order to Show Cause did not indicate

that "oral bids" would be taken at the December 11, 1975 hearing "or that the Court had authority to entertain" such bids, (par. 3); that Channel did not have a representative there to make further competitive bids and was denied its right to do so (pars. 4 and 5); that Grant had been compelled to accept "a grossly inadequate consideration" (par. 5); and that, without specifying an amount, "Channel would be prepared to bid, and pay substantially in excess of $26,500 for each of the subject leases" since $26,500 was "substantially below the current market value" (according to Mr. Levin, par. 5) (A - 47).

At the December 30, 1975 hearing, Judge Galgay rejected Channel's contentions that it had no notice or knowledge that there would be bidding on December 11, 1975 and that it had not had a perfectly fair and proper opportunity to bid at the judicial sale (TR 6)/ (A - 79). But Channel then informed the Court that it would pay $70,000 for the Cherry Hill and $35,000 for the Cinnaminson leases and offered the testimony of Mr. Tudor who had been one of its representatives at the bidding on December 11 to prove that the fair market values of the two leases were greatly in excess of the sale prices obtained on December 11th. (TR 7 and 9)/ (A-80,82). Mr. Tudor is an annually salaried real estate consultant to appellee Channel (TR 23) (A - 96).

Mr. Tudor's testimony was so flawed, inconsistent and irrelevant that the debtor's attorney moved to strike it on inso-

far as he purported to testify on the value of the leases. (TR 32). (A - 105).

The debtor Grant took no position on December 30, 1976 with respect to Channel's motion.

Judge Galgay, unimpressed by Mr. Tudor's testimony on value, saw the issue as whether the Court could "turn down" the $70,000 and $35,000 bids and for that reason in the interest of the estate of debtor Grant reopened the bidding over appellant Zartleg's objection (TR 6-7 and 35-37)/. (A-79,108). Appellant Zartleg thereafter participated in the reopened bidding without prejudice to its rights to appeal (December 30, 1975 TR 36; December 31, 1975 TR 3) (A - 109,118).

On December 31, 1975 appellee Chanel was the successful bidder on both leases at $215,200 for the Cherry Hill lease and $65,200 for the Cinnaminson lease, and Judge Galgay entered orders confirming these sales.

By Notice of Motion dated January 9, 1976, appellant Zartleg sought reargument and modification of the Court's December 31, 1975 orders to the extent of confirming sales to Zartleg in accordance with the December 11, 1975 bidding. Appellant Zartleg contended that the Court's prior decision was legally erroneous, that the $26,500 bids were equal to the fair market value and that appellee Channel's unclean hands and questionable conduct should disqualify it from being a successful bidder at any price.

The principal of focus of appellant Zartleg's motion to reargue was appellee Channel's December 12, 1975 telephone attempt, behind the Court's back, to split the leases with appellant Zartleg. This telephone approach from Channel's Board Chairman to appellant Zartleg's President, described above, was now fully described and reexamined in light of the events of December 24, 30 and 31, 1975.

Appellant Zartleg also stressed the uninhibited and outlandish nature of the claims by Channel's attorneys that there had been no notice of the possibility of bidding on December 11, 1975 and that $26,500 was grossly inadequate when it had sought to sneak by earlier with $20,000 offers.

Although Zartleg apparently may have brought these matters to the Court's attention on December 24, informally, it was at this point for the first time made part of the record upon reargument of the consequences which, under the applicable law, these should have had.

In stressing the facts that Channel's motivations in seeking to reopen the bidding were to foreclose entry by Zartleg's affiliate, Builders Emporium, into and to prevent competition in the market areas in question and that Channel's tactics were to abuse the Court's jurisdiction and make the Court itself part of its anti-competitive scheme, Zartleg was not seeking relief from Judge Galgay for an anti-trust violation. Rather, Zartleg by exposing these motivations and tactics was attempting to demonstrate that the

prices brought at the December 30 and 31, 1975 reopened bidding were not reflective of the fair market value. The fair market value for each property was equal to the prices yielded in the open and public judicial sale involving the same parties on December 11, 1975. (Zissu Aff't sworn to January 9, 1976, pars. 11 and 12, Rec. March 2, 1976 App.; January 26, 1976 TR 23) (A-170,206)

Appellant Zartleg also argued, and reargued, strenuously below that even if the December 31, 1975 orders confirming the sales to appellee Channel must stand, the Court as one of equity should, under all the circumstances here, at least require the debtor-in-possession and/or appellee Channel to reimburse it for the damages suffered by it in reliance upon the December 11, 1975 sales, even though never confirmed (Grant Aff't in Opp., par. 13; December 30, 1975 TR 9; Rogoff Aff't, pars. 12-13 and 15 and Exhibit B thereto Rec. March 2, 1976 App.; January 26, 1976 TR 14-17 & 23)/. (A-53,82,160,161,171,197-200,206) Exhibit B to Mr. Rogoff's affidavit listed expenditures of $52,138.26 by Zartleg in the December 11-24, 1975 period.

Judge Galgay by his Memorandum Opinion of March 1, 1976 (filed March 2, 1976)/ (A - 208) denied in all respects Zartleg's motion for reargument and modification of his prior orders. In this opinion the Court below, again, makes it clear that its only reason for reopening the bidding was its conclusion that $26,500 was substantially below the market value for each lease (p. 2). Judge Galgay also emphasizes that his sole reason for denying the motion to reargue is his finding "that to deprive Grant's estate of over $225,000 would be grossly unfair to Grant and its creditors..." (p. 3).

Although all parties seemed to agree below on the basic facts, appellant Zartleg, however, did dispute the claim made by appellee Channel that before its Chairman knew that Zartleg was bidding on the two stores in question for Builders Emporium, he had already instructed his representative to bid as high as necessary to obtain the subject leases.

Contrary to the possible implication in Judge Galgay's opinion below at pages 4 and 5 that the facts relating to the telephone approach by Channel's Board Chairman to Zartleg's President were not earlier before the Court, Channel's Brief below confirms that the relevant facts were before the Court below even apart from the motion to reargue (Channel Brief, p. 7).

Channel's Brief below also made it clear that Channel, which is still subject to the jurisdiction of this Court and which has been made a party to this appeal, is still in possession of the premises in question and still the owner of the lease assignments at issue.

We also believe the Court can take judicial notice of the facts, which will not be denied, (i) that the attorneys for Zartleg had notified Channels' attorneys by letter dated January 9, 1976 that in view of Zartleg's appeals and intentions to seek review of the December 31, 1975 orders, Channel would be acting at its own risk and peril in taking any further steps with respect to the two properties; and (ii) further that at the time of the District Court's decision Channel had not taken any significant steps to open these stores pending these appeals.

In addition, the record is clear that Channel and Grant were fully aware on December 30 and 31, 1975 of the fact that Zartleg would appeal (December 30, 1975 TR 36; December 31, 1975 TR 3) (A-109,118).

Disposition in the District Court

Judge Wyatt's decision of May 17, 1976, citing no cases, held that the Bankruptcy Judge was "fully justified in declining to sign the orders authorizing sales to Zartleg", solely, in view of the dollar benefit of the sale to the subsequent higher bidder, Channel. Not only did the court below cite no authorities in its decision, it also made no mention or reference to any countervailing considerations or interests in encouraging bidding at judicial sales.

In view of this conclusion, Judge Wyatt did not consider the further arguments below of Channel and the trustee that Zartleg's appeal was moot for failure to obtain a stay of the sales to Channel and that appellant Zartleg had no standing to appeal.

Judge Wyatt also affirmed the Bankruptcy Judge in holding that appellant Zartleg was not entitled to any reimbursement of the moneys laid out by it in the period between the first bidding on December 11 and the motion of Channel to reopen bidding first noticed on December 24, 1975. Again, without cuting any authorities,

the court below concluded that "[t]here was no procedure by which the Bankruptcy Court can reimburse Channel."

POINT I

WHERE THERE IS NO APPRAISAL OR UNFAIRNESS IN THE JUDICIAL SALE, THE BANKRUPTCY COURT CANNOT SET ASIDE THE FIRST BIDDING ON THE BASIS OF EVEN A SUBSTANTIALLY HIGHER BELATED BID, ESPECIALLY WHERE THE SECOND BIDDER HAS ITSELF ENGAGED IN QUESTIONABLE CONDUCT

A. The Law.

It is well established that the purpose of a judicial auction is to bring together all those who may be interested in purchasing particular property in order to induce them to bid openly and competitively for the purpose of obtaining the highest price possible. Knight v. Wertheim & Co., 158 F.2d 838, 843-44 (2nd Cir. 1946) (L. Hand, Circuit Judge).

In view of this purpose, the well established policy has also been to require confirmation of judicial sales in the absence of unfairness, fraud or gross inadequacy of price sufficient to (i) shock the conscience of the Court and (ii) raise a presumption of fraud, unfairness or mistake. In Re Stanley Engineering Corporation, 164 F.2d 316, 318 (3rd Cir. 1947) and Knight v. Wertheim & Co., supra. Accordingly, except upon the most extreme provocation, courts will not upset a judicial sale at auction upon the ground that a new bidder has appeared who

offers more than the knocked down price. Knight v. Wertheim & Co., supra at 843-44; Vol. 4A Collier on Bankruptcy ¶ 70.98 [17] p. 1181 ("extraordinary showing" necessary to justify refusal to confirm).

It has, therefore, been repeatedly held that the mere offer to pay more, or even substantially more, than the price bid is not an adequate ground for setting aside the results of a judicial sale properly conducted unless there is something more involved than mere inadequacy of price. Ballantyne v. Smith, 205 U.S. 285, 290, 27 S. Ct. 527, 528 (1907); In Re Stanley Engineering Corporation, supra; Jacobsohn v. Larkey, 245 Fed. 538, 541 (3rd Cir. 1917).

Again, the reason for this rule is that nothing will more certainly tend to discourage and prevent bidding at a judicial sale than the possibility that a prospective bidder may abstain from making his final offer, may bide his time and then may outbid the price at which the property has been struck down. Knight v. Wertheim & Co., supra at 843-44; and Jacobsohn v. Larkey, supra at 541.

Thus, Circuit Judge Kalodner has summed up and defined the extent of the discretion of the Bankruptcy Court to deny confirmation or set aside properly conducted judicial sales:

> "That judicial sales, made upon notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale; or (b) the price brought at the

> sale was so grossly inadequate as to shock the conscience of the court and[*] raise a presumption of fraud, unfairness or mistake. Mere inadequacy of price is not a sufficient ground for setting aside a judicial sale where there was no unfairness in the conduct of the sale. In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited. Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion." In Re Stanley Engineering Corporation, 164 F.2d 316, 318-19 (3rd Cir. 1947).

B. The Law's Application Here.

In this case, the importance of a prompt consummation of the lease assignments is emphasized in the Application for authorization to sell by the debtor Grant itself. That Application and the evidence submitted below did not include any appraisal of the value of any of the leases in question. After working on its program to assign the leases of its stores going out of business with over 200 developers, brokers, retailers and other persons interested in the stores, the debtor Grant procured various written offers, including those from appellee Channel for the stores involved here, for these leases. Thereafter, upon appropriate application to the bankruptcy court, a judicial sale took place on December 11, 1975 with full notice to all concerned. The sale was openly and competitively conducted in the Bankruptcy Court. Judge Galgay himself, below, has found that this sale was

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[*] emphasis supplied here.

conducted in an entirely proper manner without any unfairness on the part of anyone concerned. Nor has there been any claim that appellant Zartleg, the successful bidder at the December 11 judicial sale, has conducted itself in anything but a completely proper manner.

Under these circumstances, the only factor relied upon and possibly relating to the exercise by the Bankruptcy Judge of any discretion to reopen the bidding and to refuse to confirm the December 11 sales is the fact that appellee Channel prior to confirmation made known to the Court its willingness to bid $70,000 for the Cherry Hill lease and $35,000 for the Cinnaminson lease instead of the $26,500 knocked down prices. Although Judge Galgay, upon learning of these offers, concluded that the $26,500 prices were substantially below the fair market value, there is no finding that these prices were so grossly inadequate as to shock the conscience of the Court and raise the presumption of fraud, unfairness or mistake. Nor did the Bankruptcy Court below make any analysis of the significance of appellee Channel's offers made on December 30, 1975 except to note the difference between them and the earlier prices. In addition, the record is certainly barren of any suggestion by the Court of a presumption of fraud or unfairness.

It is also clear that the Bankruptcy Court did not weigh thepolicy in favor of requiring confirmation of judicial

sales against the difference in the prices. Rather, Judge Galgay simply held the mere difference in the prices as a sufficient ground, without more, for setting aside the judicial sales of December 11, 1975.

In addition, the Bankruptcy Court below gave no consideration to the other aspects of appellee Channel's belated offers which we respectfully submit should have been seriously taken, as a matter of equity, as militating against the reopening of the bidding. These factors are:

1. Channel itself had initially made offers of only $20,000 for the leases, in the evident hopes of obtaining them without competitive bidding;

2. The affidavit of Channel's attorney, Mr. Levin, in support of the motion to reopen the bidding and related Order to Show Cause was misleading, to say the least, in claiming that appellee Channel did not know there would be "oral" bidding on December 11 and that Channel's two representatives in Court did not have authority or a chance to obtain authority to bid;

3. After failing to win the leases on December 11, Channel's Board Chairman, whose January 16, 1976 affidavit claims that he knew full well what appellee Channel now argues is the value of the leases, telephoned Mr. Rogoff the President of Zartleg in an effort to buy one of the leases outside of the judicial proceeding, apparently, for $26,500, at the very moment

when he says he knew that the full value was much higher and when he intended to make the higher bids later on; and

4. Appellee Channel's real purpose in belatedly making the higher offers was not to obtain the leases at prices reflecting their fair market value but to obtain them for a much higher price that it was willing to pay through the Court as its instrument in a scheme to stifle and foreclose competition in the retail store business in New Jersey.

Thus, against the sole difference in price for a lease assignment where there was no appraisal, there was the sanctity of a properly conducted judicial sale and questionable conduct on the part of appellee Channel. In these circumstances, we have found no case which would allow the Bankruptcy Court as a matter of discretion to set aside the prior judicial sales and refuse confirmation of them.

In Re New Strand Theatre, infra, involved the Referee's discretion where the first sale price was, admittedly, below 75% of the appraised value, a situation, unlike ours, in which Section 70f*specifically has been held to permit a refusal to confirm..

Ballentyne v. Smith, supra, was really a "shock-the conscience" case because the first offers were 1/78 of the cost of the real property four years earlier and 1/50 of the amount for which it was bonded three years earlier. Also, there was "overwhelming" testimony that the property was worth at least seven times more than the first sale prices.

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*11 U.S.C. §110f

C. The Fundamental Issue.

The central question here on whether, by any standards, the Bankruptcy Court could have found the difference between the December 11, 1975 prices and Channel's bids on December 30, 1975 so shocking as to raise a presumption of fraud or unfairness is: why did Channel only authorize its representatives to bid up to $25,000 for each of the leases on December 11, 1975 and then two weeks later bid $70,000 and $35,000 for them? The answer cannot be found in the preposterous and incredible claims, rejected below, that Channel did not know that there could be bidding at the sale or did not authorize its representatives to bid. Judge Galgay also found the December 11, 1975 proceedings to have been properly conducted in all respects.

Zartleg respectfully submits that it was not until probably sometime on December 11, and certainly no later than December 12, when Channel's Board Chairman fully realized that Zartleg was interested in the sites for its Builders Emporium stores (that compete with Channel's own retail home centers) and that this may be the key to explaining the level of Channel's December 30 and 31 bidding.

(A -167) Mr. Rogoff in his affidavit of January 7, 1976, par. 7, states that when Mr. Slater telephoned him on December 12 the latter stated that "he had not known" of Vornado's interest in sites of 25,000 square feet, apparently since Vornado's other New Jersey stores are much larger. Mr. Slater's January 16, 1976

affidavit does not deny this version of that portion of their conversation at all.

Seen in this context, the reason for the change in bids by Channel was not, as claimed, the lack of a chance to bid the fair market value at the prior sale but instead a desire to bid far above fair market value for other, anti-competitive, reasons.

It should, therefore, be noted that appellant Zartleg in its motion to reargue urged that the Court explore further the conduct of appellee Channel-not for the purpose of seeking relief from the Bankruptcy Court for an anti-trust violation. Zartleg did this for the purpose of assisting the Court below, first, in making a fully educated determination of the fair market value for the leases in question in light of the real reasons for the excessive offers made by appellee Channel and, next, in vindicating the Court's own jurisdiction which we considered to have been abused by Channel.

On one hand, since there were no appraisals below and since the best evidence of fair market value has always been what a willing buyer and willing seller would agree upon in a fairly and openly conducted judicial sale, it was error and abuse of discretion to disregard the results of the December 11, 1975 sale.

On the other hand, if any prices are at odds with fair market value, appellant Zartleg believes it has demonstrated that it was those obtained at the December 30 and 31 reopened bidding, in light of all of the circumstances. It was this bidding, and not that of December 11, which was tinged with the unfairness and even stained by conduct that raise serious questions as to its legality (see Point III below).

D. Channel Should Not Be Permitted to Obfuscate the Issue.

Thus, the issue is not whether prior to confirmation of the bidding of December 11, 1975, appellant Zartleg obtained legal or even equitable title to the property, but rather whether, on the facts in this case, the strong policy in favor of upholding the results of a properly conducted judicial sale should be disregarded.

As noted above, we have found no case where any court has permitted the setting aside of a properly conducted sale in open court upon full notice to all concerned solely on the basis of a difference in price between the original high bid and the belated higher bid, irrespective of the difference in such prices. Nor has any such case been cited by appellees Channel or Grant.*

If there is any implication or suggestion of unfairness in the record, it flows from the conduct of appellee Channel in its telephone approach to Zartleg and its incredible posture in characterizing what occurred on December 11, 1975 in open court.

The cases that we expect will be cited again in this Court by appellees Channel and Grant to the effect that confirmation may be denied solely on the basis of the difference

*In Re Klein's Rapid Shoe Repair Co., 54 F.2d 495 (2nd Cir. 1931), did not involve the setting aside of properly conducted sale because of a subsequent bid, but an order of the District Court, on appeal, to reopen bidding due to the referee's obvious error in not accepting the highest bid at the original sale. In addition, the District Court's order was acquiesced in by all the parties.

between the first sale price and the belated bid are clearly distinguishable:

1. Reid v. King, 157 F.2d 868 (4th Cir. 1946) involved a private sale upon submission of sealed bids and not a judicial sale; the Court also considered that the requirement of gross inadequacy in price so as to raise a presumption of fraud did not apply where there had not been a judicial sale. See pages 869-70.

2. In Re New Strand Theatre, 109 F. Supp. 350 (S.D.N.Y. 1952), aff'd 201 F.2d 889 (2nd Cir. 1953), cert. den. sub. nom., Ratett v. Kaplan, 345 U.S. 995 (1953), involved a first sale price, admittedly, below 75% of the appraised value where Section 70f of the Bankruptcy Act explicitly permits a refusal to confirm.

3. J. J. Sugarman Co. v. Davis, 203 F.2d 931 (10th Cir. 1953), again, did not involve a judicial sale or even a tentative acceptance of a bid pending submission of an order of confirmation; there was also an express reservation by the trustee of the right to reject any and all sealed bids so that "in effect all [the first] bids, including appellant's were rejected." Id. at page 934.

4. Proctor & Gamble Mfg. Co. v. Metcalf, 173 F.2d 207 (9th Cir. 1949), again, involved a private sale where the Court found that the conditions of the sale of certain real property on which an oil well was located did not sufficiently protect

the bankrupt so that there had been unfairness.

5. Webster v. Barnes Banking Co., 113 F.2d 1003 (10th Cir. 1940), again, did not involve a judicial sale where the Court found the prior sale to have constituted a fraud because it was made to two persons who were found to have been grantees in a still earlier transfer of the same property in fraud of creditors. See pages 1005-006.

6. Prentice v. Boteler, 141 F.2d 175 (9th Cir. 1944) again, involved a private sale.

7. Smith v. Juhan, 311 F.2d 670 (10th Cir. 1962), and In Re Shea, 126 Fed.153 (1st Cir. 1903) also involved private sales.

8. In Re Adeline Apparel Shops, No. 61 B 251 (S.D.N.Y. 1961) (unreported opinion of Judge Levet, a copy of which was attached to Grant's Brief below/as Appendix A), did not involve a judicial sale in Court, but, again, a private sale, and the prior high bid (of the same day)/was not only never confirmed but never even informally approved pending submission of an order of confirmation.

Channel's repeated contention that Zartleg has never presented any evidence of market value overlooks the fact that Zartleg did not have to, since the bidding at the December 11, 1975 sale in Court is the best evidence of fair market value and the judicial sale, where bidding is openly and competitively conducted is, generally recognized as the way in which to obtain the highest price possible. Knight v. Wertheim and Co., 158 F.2d 838, 843-44 (2nd Cir. 1946) (L. Hand, Cir. Judge).

The evidence presented by Channel on December 30, 1975, on the otherhand, is no substitute for a judicial auction or for an appraisal by the Court. An official court appraisal is one procured by order of the Court from an independent appraiser. Smith v. Juhan, 311 F.2d 670, 673 (10th Cir. 1962). See also Jacobsohn v. Larkey, 245 F. 538 542 (3rd Cir. 1942). The testimony of Channel's witness Mr. Tudor was that of its own annually salaried real estate consultant. If his own testimony is to be believed, Mr. Tudor was unsuccessful in obtaining the requisite authority to bid for the same property on December 11 notwithstanding his "expert" knowledge and advice given by telephone to Channel's Board Chairman in the course of the bidding on that day. It is, in any event, clear from the December 30, 1975 transcript that Judge Galgay was unimpressed by Mr. Tudor's testimony and did not base his decision to reopen the bidding on it to any extent.

Jacobsohn v. Larkey, 245 Fed. 538 (3rd Cir. 1942), cited above, is particularly instructive here in noting that (i) the key to whether the Bankruptcy Court has properly exercised its discretion is the extent to which there is a discrepancy between the prices at the first sale and the Court appraisal, even assuming that the prior public sale was properly conducted and (ii) that a discretion exercised on the difference between the first and later bid would be improper:

"In the exercise of this discretion the trial court in this case found that the prices bid were grossly inadequate. It based its judgment, as we read the record, not on the difference between the bids made at the first sale and the bid offered to be made at a second, but upon the disparity between the prices bid and the property valuations made by the appraisement. Had the court refused confirmation of the sale upon a finding of an inadequate price, based upon the difference between the bids made and the bid proposed, it would have exercised a discretion of doubtful validity." [citation omitted][emphasis added] Id. at 542.

Moreover, In Re Burr Mfg. & Supply Co., 217 Fed. 16 (2nd Cir. 1914), makes clear that the "gross inadequacy" rule governing the discretion of the Bankruptcy Judge to refuse a confirmation of the bidding at a judicial sale is meant to apply only where the gross inadequacy is sufficient to raise a presumption of fraud or unfairness:

"The difference between $6,250, for which the property was first sold, and $7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the amount of $8,500, realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In Lankford v. Jackson, 21 Ala. 650, property worth $1,000 was sold for $6. In Daly v. Ely, 51 N.J. Eq. 104, 26 Atl. 263, property worth $2,500 was sold for $50. In Hardin v. Smith, 49 Tex. 420, property worth from $2 to $5 an acre was sold for 28 cents per acre. And perhaps a sale for a half, or a third of actual value may be within the rule. Sinnett v. Cralle, 4 W. Va. 600. But such a difference in value as is shown in the case at bar cannot be regarded as coming within the rule, even when taken in connection with the circumstances already noted. The circumstances relied upon raise no presumption of fraud or unfairness." [emphasis added] Id. at 21.

In Sturgis v. Corbin, 141 F. 1 (4th Cir. 1905), the Court refused to confirm the highest bid of Sturgis at an auction conducted in Court and instead accepted a belated bid for a higher amount from a person who had himself been an unsuccessful bidder at a previous sale of the same property. After noting that the first sale was properly conducted with a complete absence of any intimation of fraud or mistake, the Court vacated and set aside the confirmation of the sale to the belated bidder:

> "If a judicial sale has been fairly conducted, as was the sale we now consider, the rights of the purchaser should be protected, not only because it is his due, but also for the purpose of protecting such sales from the evil and chilling influences of instability and doubt." [emphasis added] Id. at 4.

In Sturgis v. Corbin, the Court put great emphasis upon the importance of stability and reliability in the conduct of judicial sales.

Thus, in view of the particular facts of this case, in light of the applicable precedent relating to judicial sales where there is no appraisal and where the conduct of the belated bidder raises serious questions of unfairness, appellant Zartleg respectfully urges that the Bankruptcy Judge exceeded the bounds of his discretion as a matter of law. To the extent that Judge Galgay's decision was based upon a finding that the prices obtained at the December 11, 1976 judicial sale were below the market value, such a finding, as demonstrated by the

the cases, is infected with clearly erroneous legal standards. Under the circumstances, without an appraisal and in view of the undisputed fact that the first judicial sale was properly conducted, there is no basis whatsoever for any conclusion of fact with respect to fair market value, or otherwise, to justify the setting aside of the December 11, 1975 bidding. In any event, the only standard that could justify such a decision here would be gross inadequacy of price sufficient to shock the conscience of the Court and to raise a presumption of fraud or unfairness. There is no finding by Judge Galgay of the former and, indeed, a finding by him to the contrary with respect to the latter.

Seen in this light, the question for the Court below should not have been "how to turn down $280,400.00" but rather "how the bids for $280,400.00 came about in the first place!" The answer to this question will provide the answer to how and why the results of the first judicial sales must be confirmed and how and why the subsequent sales to Channel should now be set aside and undone. Appellant Zartleg is aware of the policy in favor of obtaining the most money for creditors, but there are cases when other equally important policies, such as preserving the integrity and stability of such sales, must also be appropriately weighed in the process of decision.

POINT II

THE BANKRUPTCY COURT WAS CLEARLY ERRONEOUS IN REFUSING TO ORDER APPELLEE CHANNEL AND/OR THE DEBTOR-IN-POSSESSION TO PAY TO APPELLANT ZARTLEG THE DAMAGES IT SUFFERED DUE TO THE REOPENING OF THE BIDDING AND REFUSAL TO CONFIRM THE PRIOR SALES

It is a well established principle of equity that where the successful bidder at a judicial sale, such as appellant Zartleg here, has, even before confirmation, relied upon the finality of that sale by making expenditures on the property and the sale is subsequently set aside for no reason related to impropriety or unfairness on his part, the order setting aside the prior sale must provide for reimbursement of the expenses and damages incurred by the successful bidder at the prior sale. The East Hampton, 49 F.2d 542 (2nd Cir. 1931) (L. Hand, Circuit Judge); cf. Mesirow v. Duggan, 240 F.2d 751, 757 (8th Cir. 1957) (Whittaker, Circuit Judge-later Justice) and Green v. Duggan, 243 F.2d 109 (8th Cir. 1957).

In The East Hampton, Judge Learned Hand recognized the applicable rule in the Second Circuit for judicial sales. There, the judicial sale of a libelled ship took place on August 25 when it was struck off for $2,000. About two weeks later on September 9, but prior to confirmation, the claimant which had no prior notice of the sale of its ship and no

knowledge of it until after the sale took palce (even though the order of sale recited otherwise) intervened in the suit to set aside the prior sale, claiming lack of notice, disregard of procedural rules and a fair market value of $25,000. The lower Court then set aside the prior sale for failure to give notice to the claimant and ordered a new sale with the claimant to post a bond guaranteeing that it would bid an amount at least equal to the amount of the liens of libellant.

Judge Hand first noted that a Court will not refuse to confirm a bid merely because higher bids are in sight in view of the dangerous effect this would have on judicial sales. Id. 543.

Notwithstanding the evidence of the alleged gross inadequacy of the $2,000 price at the judicial sale, Judge Hand then concluded that the lack of proper notice was itself enough to justify setting aside the prior sale by the lower court where no rights had yet been vested by an order of confirmation. He also held that upon payment to the libellant of the amounts due to it (for unpaid for repairs), the claimant was entitled to retake its ship. Id. at 543-44.

But Judge Hand, nevertheless, recognized the obligation of the claimant, even though it was the wronged party, to reimburse the libellant for the amount spent on the vessel during period between the first sale (August 25) and the date of order vacating the sale (September 30):

> "The decree is modified and the cause remanded with instructions to require the claimant as a condition upon retaking the ship to pay the marshal's costs up to September 30, 1930; to restore to Hayes the amount of his bid and his outlay upon the ship to be ascertained, together with interest upon both up to September 30, 1930; to allow the claimant thereupon to retake the ship; and to dismiss the libel. The costs of this appeal will rest upon the appellant." Id. at 544. [emphasis supplied]

The East Hampton has been cited numerous times in this and other Circuits as applicable in judicial sales under the Bankruptcy Act. E.g. In Re New Strand Theatre, 109 F. Supp. 350 (S.D.N.Y. 1952) aff'd, 201 F.2d 889 (2nd Cir. 1953) cert. den. sub. nom. Rattet v. Kaplan, 345 U.S. 995 (1953), relied on below by appellee Channel; In Re Lustron Corp., 184 F.2d 798, 801 (7th Cir. 1950).

In Mescrow v. Duggan, supra, at 757 Justice Whittaker held that a similar "age-old equitable principle" applies where an earlier judicial sale of real estate from a debtor to an innocent purchaser is void or voidable. Justice Whittaker, therefore, held that the parties benefitting from the setting aside of the prior sale (the debtor and the purchaser at a later sale) were required to reimburse the first purchaser for his costs of permanent improvements to the property and expenses of maintaining and protecting the same, with interest. In doing so, the Court considered that such a remedy "so perfectly lends itself to the adjustment of the equities between the parties" that the lower court's failure to impose an appropriate equitable

lien for this purpose was reversed. Id. at 759.

The present case is one where this principle should apply a fortiori. First, Judge Galgay rejected below in their entirety appellee Channel's claims of improper notice and procedure on December 11 so that appellant Zartleg cannot even be claimed to have been the beneficiary of such an error at the first sale. In addition, Zartleg is only requesting to be reimbursed for its outlays until December 24, 1975 when it first learned of appellee Channel's attempt to reopen the bidding. Appellant Zartleg has been, also, willing to submit full proof to the Bankruptcy Court of its expenditures which were reasonably made in an effort to ready the two stores for the oncoming Spring-Easter period, with the full knowledge of its competitor Channel.

Appellee Channel, on the other hand, apparently knew on December 11 or 12 of its plan to attempt to seek reopening of the bidding if it could not extra-judicially split the stores with Zartleg. And yet, it did not inform anyone of this until December 24, 1975. Under these circumstances, we submit that Judge Galgay committed error in not making some provision for appellant Zartleg's expenses.

The Bankruptcy Court not only declined to make such a provision, but it did not even advert to it in any of its December 31, 1975 and March 2, 1976 decisions and orders.

Against the above cases, Channel below relied upon 6 Remington on Bankruptcy § 2573.3 for the "settled" rule that expenditures and improvements made by Zartleg prior to confirmation were made at its own risk.

Interestingly enough, Remington cites no cases for this proposition. Id. In addition, the very next sentence from that quoted below by Channel reads:

> "However, in the event of a resale, they should be given equitable consideration if they acted in good faith and what they did redounded to the benefit of the estate by protecting rights and bringing a better price or terms." [footnote omitted] 6 Remington on Bankruptcy § 2573.3 pp. 74 & 75.

Any attempt to distinguish Meiserow v. Duggan, 240 F.2d 751 (8th Cir. 1957) supra, because the expenditures there were made after confirmation, misses the point: The sale there was considered to have been wholly void because it was made despite a valid injunction against it from another Court. Consequently, the fact that the expenditures were made after confirmation is irrelevant: the confirmation never had any legal effect, the sale having been void ab initio. Under the circumstances, Meiserow v. Duggan certainly is relevant here. See also discussion of this case at 6 Remington on Bankruptcy § 2573.3 pocket supplement and Note 6.1.

Any effort to distinguish The East Hampton, 48 F.2d 542 (2nd Cir. 1931) is also unsuccessful: it has been repeatedly cited as good law applicable to all judicial sales, including those in bankruptcy proceedings. The fact that the relief there was granted against the vessel owner does not distinguish it from the present case where the relief would be granted against Channel the present owner of the leases and/or Grant the former owner, since these are the persons who, obviously, benefitted from the maintenance of the property and the reopening of bidding and resale. It is also clear that the cases cited by us make no distinction between permanent improvements and expenditures to maintain and preserve the property or which have otherwise benefitted those who sought to reopen the bidding for a resale.

STATE OF NEW YORK)

POINT III

THE CONDUCT OF APPELLEE CHANNEL BELOW AND ESPECIALLY ITS EXTRA-JUDICIAL TELEPHONE APPROACH RAISED SUFFICIENT QUESTIONS OF POSSIBLE CONTEMPT AND ILLEGALITY TO DISQUALIFY APPELLEE CHANNEL FROM THE BIDDING OR AT LEAST TO REQUIRE THE COURT AS ONE OF EQUITY TO EXPLORE THE MATTER FURTHER

The Bankruptcy Court is one of equity governed by equitable doctrines. Pepper v. Litton, 308 U.S. 295, 303-04 (1939). It is also itself a party to the judicial sales it conducts. In Re Winthrop Mills, 109 F. Supp. 323, 325 (D. Maine 1952); Vol. 4A Collier on Bankruptcy Vol. 4A ¶70.98 [15] p. 1173.

Section 41a(1) of the Bankruptcy Act, 11 U.S.C. § 69, provides that no person shall, in proceedings before a referee, "disobey or resist any lawful order, process or writ" of the Court.

According to Collier on Bankruptcy:

> "To 'disobey or resist' includes any act in opposition to an order of the referee, either directly or indirectly. Thus, persons who unite in making a cash offer to a bidder at trustee's sale to refrain from bidding, or who attempt to purchase an accepted bid for a secret consideration and couple their attempt with a threat to be present at the confirmation hearing and raise the bid if their offer is not accepted, have been held guilty in contempt for impeding, resisting and interfering with the trustee in making a sale of the bankrupt's property pursuant to the referee's order. Any attempt to induce a bidder to withdraw his bid is an even more obvious contempt under [§ 41a] clause(1)." [footnotes omitted] Vol. 2A Collier on Bankruptcy ¶41.03, pp. 1589-90.

In the case of In Re Boyd, 228 Fed. 1003, 1005 (E.D. Tenn. 1915), the Court also held that under Section 41b of the Bankruptcy Act, where questions of violations of Section 41a have been raised, denials by affidavit are not sufficient and a hearing as to the facts is required.

See also Matter of Cameron Shoe, 12 F.2d 103 (D. Cal. 1926) where similar allegations to those made by appellant Zartleg were considered to raise not only a question of contempt but an issue of whether there was an indictable offense.

The Bankruptcy Court in denying appellant Zartleg's motion to reargue mistook the point of our focusing on the telephone approach to appellant Zartleg and other objected to conduct of Channel: appellant Zartleg made clear that it was not seeking to redress an anti-trust violation but only to show (i) that the belated higher bids of Channel did not indicate prices below genuine fair market value at the prior sale and (ii) that the Court's own jurisdiction and powers may have been abused and resisted by appellee Channel's overall behavior. We still respectfully insist upon the latter point because we do not think the Court as one of equity should disregard or overlook this kind of conduct, at the very least without a full hearing into the facts, and because we believe that the manner in which events have transpired should have been considered seriously by the Court in balancing the equities

on all the issues, including the fair market value of the leases, the need for appellee Channel and/or debtor Grant to make appellant Zartleg whole for its outlays and the correctness of appellee Channel's being the beneficiary of its own unclean hands.

If the bankruptcy court considers the fully developed evidence of the telephone conversation not to be "new" because it was, as alleged by appellee Channel, before the Court earlier, we believe that it was not properly considered. If Judge Galgay considers that it was neither new nor presented before, we don't believe that as a Court of equity is required to or should close its eyes to the facts when these were timely brought to its attention in a motion to reargue. In Re Rapier Sugar Feed Co., 13 F. Supp. 85, 89 (W.D. Ky. 1935); Prentice v. Boteler, 141 F. 2d. 175, 176 (9th Cir. 1944). See also Donovan & Schuenke v. Sampell, 226 F.2d 804 (9th Cir. 1955) as authority for the Court's inherent power under general principles of equity.

In Re Rapier Sugar Feed Co., 13 F. Supp. at 89 is relevant here:

> "A bankruptcy sale should be conducted with the utmost fairness and good faith. Fraud, unfairness, and misrepresentation, or impositions practiced at the sale by either sellers or buyers are sufficient grounds to set aside or refuse confirmation, and one seeking to set aside a sale on any of the above grounds is not chargeable with laches until he has acquired knowledge of the facts constituting fraud, or could have acquired them by the exercise of ordinary care, but prompt inquiry must be instituted by the aggrieved party to ascertain the facts and quick action taken after ascertainment to correct the wrong."

POINT IV

APPELLANT ZARTLEG AS THE HIGH BIDDER AT THE FIRST SALE CLEARLY HAS SUFFICIENT STANDING TO OBJECT TO THE SALE TO CHANNEL AND TO APPEAL

The cases cited by appellee Channel below to support its contention that Zartleg does not have standing do not bear upon the standing of Zartleg as the high bidder and successful bidder at the first judicial sale of December 11, 1975 where there has been a subsequent reopening of competitive bidding. All of the cases cited for this proposition relate to one appealing who is not a creditor but only a losing bidder at a judicial sale and have nothing to do with the situation in which the objecting or appealing party was the high bidder at the earlier judicial sale.

In fact, the very cases cited to Judge Wyatt by Channel clearly indicate this e.g. In Re Harwald Company, 497 F.2d 443, 444 (7th Cir. 1974) where the Court makes clear that it is the "unsuccessful bidder" who does not have standing.

The established rule on st ding is set forth in Collier on Bankruptcy:

"Confirmation of a sale, on the other hand, may be denied for less serious reasons, i.e., if raised by persons with sufficient interest to have a standing to object, typically creditors or high bidders*...

[from footnote 95]

OBJECTIONS AVAILABLE TO HIGH BIDDER. -- The standing of the high bidder to object to a sale to a lower bidder, or even to one who submits a higher bid after competitive bidding has once been brought to a close, has frequently been recognized. See, e.g., J.J. Sugarman Co. v. Davis (C.A. 10th, 1953) 203 F. (2d) 931; in re Stanley Engineering Corp. (C.C.A.3d, 1947) 164 F.(2d) 316, cert. den. sub nom. Root v. Galman (1948) 332 U.S. 847, 68 S.Ct. 351, 92 L.Ed. 417; Smith v. Save-Rite Drug Stores (C.A. 10th, 1949) 178 F.(2d) 507; in re New Strand Theatre, Inc. (S.D.N.Y. 1952) 109 F. Supp. 340, aff'd (C.A.2d, 1953) 201 F.(2d) 889, cert. den. sub nom. Ratett v. Kaplan (1953) 345 U.S.995, 63 S.Ct. 1137, 97 L.Ed. 1402." Vol. 4A Collier on Bankruptcy ¶70.98 [17] pp. 1187-88. [emphasis added]

In Re New Strand Theatre, Inc., 109 F.Supp. 350, (S.D.N.Y., 1952), supra, involved a petition by the high bidder at a judicial sale to review the subsequent rejection of his winning bid and the reopening of bidding in view of a belated significantly higher bid by one of the persons that had been an unsuccessful bidder at the earlier judicial sale. As here, the sale pursuant to the first auction had never been confirmed by an order of the Court. In such circumstances, Judge Weinfeld did not consider the bidder to lack standing since he had been the "high bidder" at the first sale.

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*footnote 95

POINT V

WHERE CHANNEL AS OWNER OF THE LEASES IN QUESTION IS SUBJECT TO THE JURISDICTION OF THIS COURT AND HAS BEEN MADE A PARTY TO THIS APPEAL, THIS APPEAL IS NOT MOOT FOR FAILURE TO OBTAIN A STAY OF THE SALE TO CHANNEL PENDING THE APPEAL.

Although the pendency of these appeals by appellant Zartleg does not stay the effect of the orders appealed from and has not prevented appellees Grant and Channel from consummating the assignment of the two leases in question, where complete relief, in the event these appeals are successful, can still be obtained from Channel who is subject to the jurisdiction of this Court and who has been made a party to the appeals, there was no necessity for appellant Zartleg to obtain a stay pending the appeal and the appeals are not moot due to any inability to realize the benefit of a successful appeal.

Rule 11-62 of the Rules of Bankruptcy Procedure provides in relevant part:

> "(2) The following shall be added to Rule 805 thereof: Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

In the Advisory Committee's note to Rule 11-62, the following statement appears:

> "Paragraph (2) of this rule is in accord with case law effectuating a sale pending appeal to a good faith purchaser in the absence of the appellant obtaining a stay of the order approving the sale."

The case law, however, indicates that the meaning of this rule is that it would not apply here with respect to the sale to Channel which has submitted itself to the jurisdiction of this Court, is still subject to the jurisdiction of this Court and has been made a party to this appeal. The situation would be different if the sale had been to a party who is not subject to the jurisdiction of the Court and has not been made a party to the appeal, or if Channel had, in turn, reassigned the leases to another person not involved in the proceedings in this Court. Accordingly, a correct statement of the case law is contained in Vol. 9 Moore's Federal Practice ¶208.03 page 1408:

> "But the appellant does not lose his right of appeal merely because the judgment has been executed or otherwise acted upon if he can secure effective relief following reversal. A prevailing party who acts upon a judgment before an appeal is determined cannot complain that his adversary should have obtained a stay to prevent him from acting. [footnotes omitted]
>
> A stay pending appeal, usually in the form of an injunction, is necessary only if what may be done under the judgment is beyond the power of the court of appeals to undo by its judgment."

The reason for any requirement that the appellant obtain a stay pending appeal is to insure that he can secure effective relief following a possible reversal. But where the appellate court still has the power to effectuate a reversal, there is no requirement of obtaining a stay pending appeal.

In Porter v. Gerstel, 222 F.2d 137 (5th Cir. 1955), appellants were seeking to overturn the order of adjudication

of bankruptcy on the grounds that the Bankruptcy Court was being improperly and fraudulently used to defraud them as owners of 50% of the common stock of the bankrupt. Before the appeal from the District Court's affirmance of the Bankruptcy's Court's order of adjudication, since the appellants had failed to obtain a stay and post a supersedeas bond, the administration of the estate, including the sale of its assets, had been completed. Judge Tuttle rejected the appellees contention that this had rendered the appeal moot:

> "The failure to obtain an order of supersedeas does not ordinarily affect the right of appeal. 4 C.J.S., Appeal and Error, § 678. Under the facts of this case as alleged, and as the proof now stands, we can not say that the bankruptcy court is without the power to correct the wrong that resulted if, on a full hearing, it determines that the intervenors have made out a case of fraud.
>
> * * *
>
> If the Referee finds upon remand of this case that the facts show that the adjudication of bankruptcy should be set aside under the legal principles herein stated, then whatever actions followed the entry of his order dismissing the intervention must be set aside unless legal rights of strangers to the proceedings have intervened.
>
> * * *
>
> All orders allowing fees and commissions would, under such a holding of the Referee, be void, and such payments would be subject to being repaid to the alleged bankrupt's estate. It would be the duty of the bankruptcy court to recover for the alleged corporate petitioner all of the assets of which it was possessed on the day of the filing of the petition, except insofar as such recovery is prevented by intervening legal rights." Id. at 142. [emphasis added]

Upon petition for rehearing, the Court also held that all parties who had notice of the fact of appeal acted thereafter at their own risk. Id. at 143.

Similarly in United Properties, Inc. v. Emporium Department Stores, Inc., 379 F.2d 55, 71 (8th Cir. 1967) the Court held that the absence of a stay of the Bankruptcy Court's order authorizing the distribution of monies to creditors and the fact that such distribution had already been made did not affect the appellants' rights on the appeal, distinguishing cases where the failure to obtain a stay resulted in a dismissal of the appeal. The Court stressed that in such other cases the interested parties had not been made parties to the appeal. Id. at 71 and 72.

The Court also held that the appellants were not required to obtain a stay pending the appeal:

> "The appellees also contend that since the appellants had a right to request a stay of all proceedings upon filing its appeal, and since the Referee was empowered to grant one, the appellants were required to request one.
>
> * * *
>
> No authority has been cited for this proposition. Neither the Federal Rules of Civil Procedure nor decisions of the Court require an appellant to make application for a stay. Rule 73(d) [now 62(d)] of the Federal Rules of Civil Procedure provides that whenever an appellant, entitled thereto, desires a stay on appeal, he may present to the Court for its approval a supersedeas bond which shall be conditioned for the satisfaction of the judgment in full, together with cost, interest and damages for delay.
>
> The Referee's decision to make a distribution, on the insistence of the Debtor and Creditors Committee,

was made with full knowledge of the consequences of a reversal of the Referee's order.

The appellees also urge that even though the appellants did not have a legal obligation to apply for stay, their failure to do so ought to be considered by this Court as inequitable conduct on the part of the appellants which should be given weight by this Court in reaching its decision. We find no precedent for this view." Id. at 72.

In Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 91 F.2d 141 (8th Cir. 1937), two life insurance companies brought an interpleader action in connection with the distribution of the proceeds of life insurance policies to the proper conflicting claimants. The appellees sought dismissal of the appeals from the District Court's decree because the clerk of the lower court had already paid the proceeds over to the claimant victorious below in the absence of a stay pending the appeal. The Court denied this motion:

"Their failure to obtain a stay did not affect their right to appeal. [citations omitted] If there should be a reversal, the lower court, having jurisdiction over the parties, would have the right to award restitution. [citations omitted] As said by the Supreme Court in Baltimore & O. R. Co. v. United States, supra, 'The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done.* * * When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order.'

So, in the instant case, the appellants have the right to prosecute these appeals so as to establish if they can the invalidity of the decrees appealed from

and thus give rise to an obligation against the Iowa administrator to make restitution."

See also Thorpe v. Thorpe, 364 F.2d 692, 693 n. 1 (D. C. Cir. 1966); Koster & Wythe v. Massey, 262 F.2d 60, 62 (9th Cir. 1958); Barrett v. Denver Tramway Corporation, 146 F.2d 701 (3rd Cir. 1944).

These cases make clear that the only risk run here by appellant Zartleg in not obtaining a stay pending appeal would be the possibility of Channel's having conveyed or reassigned its leases to another person who is a bona fide purchaser and stranger to these proceedings or the possibility that if Zartleg is granted the right to obtain reimbursement for its expenditures on the properties, Channel will be incapable, financially, of paying later on.

The facts in the cases cited by appellee Channel are all readily distinguishable from those here so that they have no application to the present facts:

Sterling v. Blackwelder, 405 F.2d 884 (4th Cir. 1969) and 387 F.2d 346 (4th Cir. 1967) and In Re Abingdon Realty Corp. _____F.2d_____ (4th Cir. 1976) (decided January 22, 1976 after these appeals were commenced) ¶65,879 CCH Bankruptcy Reporter, are both cases where, unlike here, third person lienholders had changed positions in reliance upon the closed transfers of the property to purchasers. In In Re Abingdon, prior to the sale one of the lienholders was the I.R.S. to the extent of $2,000,000

and the appealing bankrupt had previously through its receiver agreed to the sale.*

In Re Stratford Financial Corp., 264 F. Supp. 917 (S.D.N.Y. 1967)only makes the point that the filing of a petition for review does not itself stay the Order of the Bankruptcy Court to be reviewed.

In Taylor v. Austrian, 154 F.2d 107 (4th Cir. 1969) the sale had been to a third person not involved or party to the court proceedings and not subject to the jurisdiction of the Court.

In Re Lewis Jones, Inc., 369 F. Supp. 111, 118 (E.D. Pa. 1973) the question was not whether the appealing party could appeal but only whether it had sought a stay at a point too late to obtain the stay. The Court specifically stated that the appellant's remedies, if successful, constituted another question. Id.

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*Fink v. Continental Foundry & Machine Company, 240 F.2d 369 (7th Cir. 1957) and Sobel v. Whittier Corp. 195 F.2d 361 (6th Cir. 1952), relied on by Abingdon, supra, were actions to enjoin a sale of the assets and a liquidation of defendant and a merger, respectively. In Fink the purchaser was not a party to the action and the Court made it clear that its decision was based upon the facts that pending the appeal the Court had lost jurisdiction over the assets and that it had no power over the purchaser. In Sobel the Court also considered the appeal moot without a stay because of the numerous contractual rights of other strangers to the proceedings, including a new corporation, lenders and mortgagees, that had been created in reliance upon the merger, over which the court had no jurisdiction.

It should also be noted that the appeals here raise questions relating not only to assignments of the two leases but also to the right, alternatively, of Zartleg to other equitable relief in the form of recovery of the expenses incurred between December 11 and 24, 1975. cf. Barrett v. Denver Tramway Corporation, 146 F.2d 701, 702 (3rd Cir. 1944).

Conclusion

In view of the above, this Court should reverse the orders appealed from, order that the leases in question be assigned to appellant Zartleg and grant Zartleg such other relief as may be just. In the alternative, the Court should at least order that Zartleg be reimbursed for its expenses in the December 11-24, 1975 period.

Dated: New York, New York

August 10, 1976

Respectfully submitted,

Jack Dashosh
Attorney for Appellant Zartleg
450 Park Avenue
New York, New York
(212) 371-3900

Cowan, Liebowitz & Latman, P.C.
Of Counsel
200 East 42nd Street
New York, New York 10017
(212) 986-6272

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLAN FELDMAN, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 41-48 40th ST LONG ISLAND CITY, N.Y.

That on the 13th day of August, 1976, deponent personally served the within BRIEF OF APPELLANT ZARTLEG upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Appellee W. T. Grant Company
299 Park Ave., New York, N. Y. 10010

WEIL, GOTSHAL & MANGES
Attorneys for Appellee The Creditors' Committee
767 Fifth Ave., New York, N. Y. 10017

BALLON, STOLL & ITZLER
Co-Counsel to Appellee The Creditors' Committee
1180 Ave. of the Americas, New York, N. Y. 10036

PARKER, CHAPIN & FLATTAU
Attorneys for Appellee Channel Companies, Inc.
530 Fifth Ave., New York, N. Y. 10036

Allan Feldman

Sworn to before me this
13th day of August, 1976.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JULIO VALLEJO, JR., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2742 Pitkin Ave., Brooklyn, N. Y.

That on the 13th day of August, 19 76, deponent personally served the within BRIEF OF APPELLANT ZARTLEG upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving _____ true copies of same with a duly authorized person at their designated office.

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

TAENZER & FRIEDMAN
Attorneys for Appellee Cinnaminson Shopping Center, Inc.
Rt. 130 & Riverton Rd.
Cinnaminson, New Jersey 08077

Julio Vallejo, Jr.

Sworn to before me this
13th day of August, 1976.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 77